

IN THE SUPREME COURT OF MISSOURI

No. SC86685

STATE ex rel. THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

and

GATEWAY WESTERN RAILWAY COMPANY,

Relators,

v.

THE HONORABLE MICHAEL P. DAVID,

Respondent.

ORIGINAL WRIT PROCEEDING
IN MANDAMUS OR, IN THE ALTERNATIVE, IN PROHIBITION

RELATORS' BRIEF

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JURISDICTIONAL STATEMENT

This action is an original writ proceeding, in mandamus or prohibition, seeking relief from Respondent's refusal to transfer venue of this action out of the City of St. Louis. As such, it involves the question of whether Respondent failed to perform a ministerial duty when he refused to transfer the case from the City of St. Louis to Saline County, or, in the alternative, whether Respondent can take any further action other than transferring the case from the City of St. Louis to Saline County. This Court has jurisdiction to issue and determine original remedial writs pursuant to Article V, § 4, of the Missouri Constitution.

STATEMENT OF FACTS

Plaintiff Thomas Sullivan filed an action in January 2002 against three railroad companies: The Kansas City Southern Railway Company (“KCS”), Gateway Western Railway Company (“GWR”),¹ and The Burlington Northern & Santa Fe Railway Company (“BNSF”). *Order, St. Louis City Cir. Ct. (Apr. 6, 2004), p. A10.*² Plaintiff’s claims arise from personal injuries allegedly sustained in a train collision that occurred in or near Slater in Saline County, Missouri on March 16, 2001. *See Petition, ¶ 5 of Counts I-III, ¶ 6 of Count IV, Ex. 1, pp. 2, 4, 6, 8;*³ *see also Affidavit of Thomas Martin, ¶ 6, p. A5.*

¹ GWR was fully merged into KCS and went out of existence on October 1, 2001. *See Affidavit of Thomas Martin, ¶ 3, attached hereto as Ex. 2B, p. 26.*

² All appendix materials were filed as exhibits to Relator’s Petition for a Writ of Mandamus, or, in the alternative, Petition for a Writ of Prohibition pursuant to Mo. R. Civ. P. 94.03 and 97.03 and are included in the appendix for the convenience of the Court, or as specifically required under Mo. R. Civ. P. 84.04(h)(2) (requiring relevant statutes to be included in the appendix).

³ All citations to exhibits are to the exhibits attached to Relator’s Petition for a Writ of Mandamus, or, in the alternative, Petition for a Writ of Prohibition, pursuant to Mo. R. Civ. P. 84.24(g).

As originally filed, Plaintiff asserted claims against GWR and KCS in Counts I and II respectively based on the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, and against BNSF in Count III based on common law negligence. *Order, St. Louis City Cir. Ct. (Apr. 6, 2004), pp. A10-A11.*

Relators KCS and GWR do not operate a railroad or railroads in the City of St. Louis. *Answer to Petition for Writ of Mandamus, or, in the Alternative, Petition for Writ of Prohibition, ¶ 15 [hereinafter "Answer to Writ Petition"]*; see *Affidavit of Thomas Martin, ¶¶ 4-5, p. A5*. BNSF does operate a railroad within the City of St. Louis. *Answer to Writ Petition, ¶ 16.*

On February 27, 2002, Relators KCS and GWR timely filed a Joint Motion to Transfer Venue Based on Pretensive Joinder. *See Order, St. Louis City Cir. Ct. (Apr. 6, 2004), p. A11*. After the trial court denied Relators' Joint Motion to Transfer Venue Based on Pretensive Joinder, Relators filed a Petition for Writ of Prohibition barring the trial court from taking any further action except to transfer the case to Saline County, Missouri—the location of the accident which forms the basis for this lawsuit. The Eastern District Court of Appeals agreed, entering its Preliminary Writ of Prohibition on April 3, 2003, and making that writ permanent on May 6, 2003, thus ordering the trial court to transfer venue of the action out of the City of St. Louis to Saline County. *See id.*; *Order, Mo. Ct. App. E.D., No. ED 82696 (May 6, 2003), Ex. 2E, pp. 31-32*. Before the mandate for the Court of Appeals' Order of May 6, 2003 was issued, however, Plaintiff voluntarily dismissed his case on May 21, 2003. *See Order, St. Louis City Cir. Ct. (Apr.*

6, 2004), pp. A11-A12; see also *Plaintiff's Motion for Voluntary Dismissal Without Prejudice*, Ex. 2F, p. 33.

Eight days later, Plaintiff filed the underlying action in the Circuit Court for the City of St. Louis as *Thomas Sullivan v. Gateway Western Railway Company, Kansas City Southern Railway Company, and The Burlington Northern & Santa Fe Railway Company*, Cause No. 032-01602. *Plaintiff's Petition*, Ex. 1, p. 1-10; see also *Order, St. Louis City Cir. Ct. (Apr. 6, 2004)*, pp. A11-A12. The Petition in the re-filed case asserted the same claims against the same three defendants as in the original lawsuit: claims against GWR and KCS in Counts I and II respectively based on the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, and against BNSF in Count III based on common law negligence. *Order, St. Louis City Cir. Ct. (Apr. 6, 2004)*, pp. A10-A11; *Petition*, Ex. 1, pp. 1-7. In addition, the re-filed Petition included an additional count, Count IV, against BNSF under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, alleging that BNSF failed to provide Plaintiff a safe place to work. *Order, St. Louis City Cir. Ct. (Apr. 6, 2004)*, pp. A10-A12; *Petition*, Ex. 1, pp. 7-10.

On September 19, 2003, Relators timely filed Motions to Transfer Venue of the re-filed lawsuit on the grounds that (1) Plaintiff pretensively joined BNSF to create venue in the City of St. Louis, and (2) under the doctrines of "law of the case" and res judicata, the trial court was bound by the previous ruling of the Court of Appeals that venue of this case be transferred out of the City of St. Louis to Saline County. *KCS's Answer to Plaintiff's Petition and Motion to Transfer Venue*, Ex. 3, pp. 34-56 [hereinafter *KCS's*

Motion to Transfer]; GWR's Answer to Plaintiff's Petition and Motion to Transfer Venue, Ex. 2, pp. 11-33 [hereinafter GWR's Motion to Transfer].

On the issue of pretensive joinder, KCS and GWR argued that Plaintiff's claim against BNSF in Count III based on common law negligence, alleging an unsafe condition of the locomotive engine on which Plaintiff was riding at the time of is accident, was preempted by the Boiler Inspection Act, 49 U.S.C. §§ 20701 *et seq.*, and that Plaintiff did not have a cause of action against BNSF in Count IV under the FELA because the affidavits filed by Defendants established that Plaintiff was not an employee of BNSF at the time of the accident and that the information available to Plaintiff at the time he re-filed his lawsuit did not support a reasonable legal opinion that Plaintiff was an employee of BNSF at the time of the accident. *KCS's Motion to Transfer, Ex. 3, pp. 37-53; GWR's Motion to Transfer, Ex. 2, pp. 14-30.*

With respect to Plaintiff's lack of an employment relationship with BNSF at the time of the accident, the affidavits submitted by Relators in support of their Motions to Transfer Venue showed the following: At the time of the accident, Plaintiff was operating Train No. MESKCBN1-16. The train crews that operated this train between the point of origination and the place of the accident were not employees of BNSF. The train crews were not called to work by BNSF crew callers. The train crews were not paid by BNSF. The train was not dispatched by BNSF train dispatchers. The train crews did not work under the supervision of a BNSF trainmaster or other BNSF supervisory employee. BNSF's operating rules, safety rules, timetable, train orders, train bulletins,

and superintendent's notices did not apply to operation of the train between the point of origination and the place of the accident. BNSF did not provide copies of its operating rules, safety rules, timetable, train orders, train bulletins, or superintendent's notices to the train crews that operated the train between the point of origination and the place of the accident. BNSF did not provide instruction or training to the train crews that operated the train between the point of origination and the place of the accident. BNSF did not direct, control, supervise, or oversee the work of the train crews between the point of origination and the place of the accident. The train crews were not subject to discipline by BNSF. *Affidavit of Eric Ege*, ¶¶ 8-9, pp. A2-A3; *Affidavit of Thomas Martin*, ¶¶ 6-14, pp. A5-A9.

With respect to Plaintiff's employment relationship with GWR at the time of the accident, the affidavits showed the following: At the time of the accident, Plaintiff was operating Train No. MESKCBN1-16. Train No. MESKCBN1-16 was dispatched by GWR train dispatchers. Plaintiff and the train crews that operated this train worked under the supervision of a GWR trainmaster, a GWR Manager of Operations, and a GWR Terminal Superintendent at the time of the accident. GWR's operating rules, safety rules, timetable, train orders, and train bulletins governed operation of the train between the point of origination and the place of the accident. GWR provided copies of its operating rules, safety rules, timetable, train orders, and train bulletins to Plaintiff and the train crews between the point of origination and the place of the accident. GWR provided instruction and training to Plaintiff and the train crews that operated the train between the

point of origination and the place of the accident. GWR directed, controlled, supervised, and oversaw the work of the Plaintiff and the train crews between the point of origination and the place of the accident. Finally, Plaintiff and the train crews that operated the train from the point of origin to the place of the accident were only subject to discipline by GWR. *Affidavit of Thomas Martin*, ¶¶ 6-14, pp. A5-9; *Affidavit of Eric Ege*, ¶¶ 6-7, p. A2.

On April 6, 2004, Respondent, the Honorable Michael P. David, denied Relators' Motions to Transfer Venue. *Order, St. Louis City Cir. Ct. (Apr. 6, 2004)*, pp. A11-A16. In his Order, Respondent stated that Count III against BNSF was preempted by federal law and, therefore, failed to state a claim; however, Respondent concluded that Count IV stated a claim against BNSF and refused to consider the affidavits submitted by Relators. Respondent stated that "to the extent defendant [sic] relies on evidence in support of its [sic] contention regarding plaintiff's employment status, the issue is more appropriate for summary judgment." *Id. at p. A15*. Respondent's Order did not address Relators' arguments that venue of the action had to be transferred out of the City of St. Louis based on the doctrines of res judicata and law of the case. *See id. at pp. A11-A16*.

Relators filed a joint Motion for Reconsideration on April 8, 2004, arguing that Respondent was required to decide the question of whether Plaintiff could prove a claim in connection with Relators' Motions to Transfer Venue and not wait until a motion for summary judgment is filed because venue may not be challenged based on a party being dismissed from a lawsuit on summary judgment. *Defendants' Motion for*

Reconsideration of Court's Failure to Rule on Defendants' Motion to Transfer Venue Based on Pretensive Joinder, Ex. 7, pp. 98-155 [hereinafter Defendants' Motion for Reconsideration]. Respondent denied Defendants' Motion for Reconsideration on December 17, 2004, stating that: "To rule at this point that BNSF was pretensively joined would in effect be a declaration by the Court that BNSF is entitled to summary judgment, a ruling BNSF has not sought." *Order, St. Louis City Cir. Ct. (Dec. 17, 2004), p. A18*.

On March 10, 2005, the Missouri Court of Appeals, Eastern District, denied Relators' Petition for a Writ of Mandamus seeking the relief sought here. *See Order, Mo. Ct. App. E.D., No. ED 85791 (Mar. 10, 2005), Ex. 9, p. A159*.

On April 26, 2005, this Court entered its Alternative Writ of Mandamus. On June 2, 2005, this Court entered an Order making Respondent's Answer/Return to the Alternative Writ of Mandamus due on or before June 6, 2005.

POINTS RELIED ON

- I. Relators Are Entitled To An Order Directing Respondent To Transfer Venue Of This Action Out Of The City Of St. Louis To Saline County, Because Under Mo. Rev. Stat. §§ 476.410 And 508.040 Respondent Erroneously Refused To Transfer Venue, In That The Only Resident Defendant Was Pretensively Joined To Create Venue In The City Of St. Louis.**

Bailey v. Missouri-Kansas-Texas R.R., 732 S.W.2d 248 (Mo. Ct. App. E.D. 1987)

State ex rel. DePaul Health Ctr. v. Mummert, 870 S.W.2d 820 (Mo. 1994)

State ex rel. Shelton v. Mummert, 879 S.W.2d 525 (Mo. 1994)

Mo. Rev. Stat. § 476.410

Mo. Rev. Stat. § 508.040

- II. Relators Are Entitled To An Order Directing Respondent To Transfer Venue Of This Action Out Of The City Of St. Louis To Saline County, Because Under The “Law Of The Case” Respondent Erroneously Refused To Transfer Venue, In That The Missouri Court Of Appeals Had Already Once Entered An Extraordinary Writ In This Case, Before It Was Voluntarily Dismissed And Re-Filed, Ordering Respondent To Transfer Venue From The City Of St. Louis To Saline County.**

Bellon Wrecking & Salvage Co. v. David Orf, Inc., 983 S.W.2d 541 (Mo. Ct. App. E.D. 1998)

Mallet v. State, 769 S.W.2d 77 (Mo. 1989) (Blackmar, J., concurring)

Oldaker v. Peters, 869 S.W.2d 94 (Mo. Ct. App. W.D. 1993)

State v. Pettaway, 81 S.W.3d 126 (Mo. Ct. App. W.D. 2002)

III. Relators Are Entitled To An Order Directing Respondent To Transfer Venue Of This Action Out Of The City Of St. Louis To Saline County, Because Under The Doctrine Of Res Judicata Respondent Erroneously Refused To Transfer Venue, In That The Missouri Court Of Appeals Had Already Once Entered An Extraordinary Writ In This Case, Before It Was Voluntarily Dismissed And Re-Filed, Ordering Respondent To Transfer Venue From The City Of St. Louis To Saline County.

Penner v. Whitesell, 538 S.W.2d 772 (Mo. Ct. App. 1976)

SE-MA-NO Electric Cooperative v. City of Mansfield, 321 S.W.2d 723 (Mo. Ct. App. 1958)

State ex rel. Buchanan County v. Patton, 197 S.W. 353 (Mo. 1917)

ARGUMENT

I. Standard Of Review

Relators seek relief through this original writ proceeding on the grounds that Respondent misconstrued and misapplied the law regarding pretensive joinder of a resident defendant to create venue by refusing to apply the second test for pretensive joinder. Furthermore, Relators contend that Respondent misconstrued and misapplied the law regarding the “law of the case” and res judicata. Therefore, the appropriate standard of review is de novo. *State ex rel. Budd Co. v. O’Malley*, 114 S.W.3d 266, 268 (Mo. Ct. App. W.D. 2003) (applying de novo standard of review in original writ proceeding to determine whether Respondent misconstrued or misapplied the law regarding venue).

II. Relators Are Entitled To An Order Directing Respondent To Transfer Venue Of This Action Out Of The City Of St. Louis To Saline County, Because Under Mo. Rev. Stat. §§ 476.410 And 508.040 Respondent Erroneously Refused To Transfer Venue, In That The Only Resident Defendant Was Pretensively Joined To Create Venue In The City Of St. Louis.

Respondent’s ruling below is contrary to law. This Court recently affirmed that “[t]here are two tests for pretensive joinder” and “[j]oinder is pretensive if either test is satisfied.” *State ex rel. Doe Run Resources Corp. v. Neill*, 128 S.W.3d 502, 504 (Mo. 2004), *cert. denied*, 125 S.Ct. 272 (2004). However, Respondent, in violation of his statutory, ministerial duty to transfer a case filed in an improper venue, failed to apply the second test for pretensive joinder.

Venue is pretensive if (1) the petition on its face fails to state a claim against the resident defendant; or (2) the petition does state a cause of action against the resident defendant, but the record, pleadings and facts presented in support of a motion asserting pretensive joinder establish that there is, in fact, no cause of action against the resident defendant and that the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against the resident defendant.

State ex rel. Shelton v. Mummert, 879 S.W.2d 525, 527 (Mo. 1994) (citations omitted).

“Both tests are objective, requiring that the plaintiff have a realistic belief under the law and evidence that a valid claim exists.” *Doe Run Resources Corp.*, 128 S.W.3d at 504.

Because all defendants are corporations, Mo. Rev. Stat. § 508.040 governs venue in this case. Under § 508.040, venue of the case can be maintained in the City of St. Louis only if one of the defendants operated a railroad in the City of St. Louis or had an office or agent in the City of St. Louis for the transaction of its usual and customary business. Since Relators KCS and GWR do not operate a railroad or maintain an office or agent in the City of St. Louis, venue of the action is proper only if BNSF, which does operate a railroad in the City of St. Louis, was properly joined in the lawsuit.

In their Motions to Transfer Venue, Relators argued that BNSF was pretensively joined under the first test of pretensive joinder as to the claim in Count III and under the second test of pretensive joinder as to the claim in Count IV. *KCS’s Motion to Transfer*,

Ex. 3, pp. 37-53; GWR's Motion to Transfer, Ex. 2, pp. 14-30. As to the claim against BSNF in Count III, Relators argued that Plaintiff's common law negligence claim is preempted by a federal statute. *KCS's Motion to Transfer, Ex. 3, p. 38; GWR's Motion to Transfer, Ex. 2, p. 15.* Respondent agreed and dismissed Count III with prejudice. *Order, St. Louis City Cir. Ct. (Apr. 6, 2004), pp. A12-A14.* As to claim the against BNSF in Count IV, Relators argued that the affidavits attached to their Motions to Transfer Venue demonstrated that Plaintiff could not prove an FELA claim against BNSF and had no reasonable basis for believing when he filed his lawsuit that he had an FELA claim against BNSF because Plaintiff was not an employee of BNSF at the time of his accident. *KCS's Motion to Transfer, Ex. 3, pp. 38-40; GWR's Motion to Transfer, Ex. 2, pp. 15-17.* Respondent refused to rule on whether BNSF was pretensively joined on Count IV and denied Relators' Motions to Transfer Venue.

In denying Relators' Motions to Transfer Venue based on pretensive joinder, Respondent refused to consider the evidence submitted in Relators' affidavits on this point on the grounds that "[t]o the extent defendant [sic] relies on evidence in support of its [sic] contention regarding plaintiff's employment status, the issue is more appropriate for summary judgment." *Order, St. Louis City Cir. Ct. (Apr. 6, 2004), p. A15.* Accordingly, Respondent concluded that the Motions to Transfer Venue were "premature . . . because the claim is still pending against Burlington Northern." *Id.* (citing *State ex rel. du Pont de Nemours & Co. v. Mummert*, 890 S.W.2d 367 (Mo. Ct. App. E.D. 1994)).

In their Motion for Reconsideration, Relators asked Respondent to consider the evidence in the affidavits they submitted with their Motions to Transfer Venue that demonstrated that Plaintiff was not an employee of BNSF at the time of his accident and had no reasonable basis for believing at the time he filed his lawsuit that he had been an employee of BNSF at the time of his accident. *Defendants' Motion for Reconsideration, Ex. 7, pp. 98-101.*

Although Respondent relied on *State ex rel. du Pont de Nemours & Co. v. Mummert*, 890 S.W.2d 367 (Mo. Ct. App. E.D.1994), to support his ruling that Relators' Motions to Transfer Venue were not yet ripe with respect to that issue, Relators pointed out in their Motion for Reconsideration that Respondent's reliance on *du Pont* was misplaced. *Defendants' Motion for Reconsideration, Ex. 7, pp. 98-101.* The court in *du Pont* refused to hold that venue was improper based on the pretensive joinder of one resident defendant because a claim was still pending against a second, separate resident defendant. *Du Pont*, 890 S.W.2d at 369. By contrast, the only claims at issue in the case at hand are against BNSF—the only resident defendant. *Du Pont* is therefore inapposite.

In addition, Relators pointed out to Respondent that venue must be challenged in a pre-answer motion and cannot be raised anew after a ruling on a motion for summary judgment results in the dismissal of a party whose presence in the lawsuit formed the sole basis for venue in the forum county. *Defendants' Motion for Reconsideration, Ex. 7, pp. 98-101* (citing *Breckenridge v. Sweeney*, 920 S.W.2d 901, 903 (Mo. 1996) (“We hold . . . that a challenge of pretensive joinder based on defective pleadings should be determined

when the challenge is adjudicated”); *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 822 (Mo. 1994) (“By terms of the statute, venue is determined as the case stands when **brought**”); *Hefner v. Dausmann*, 996 S.W.2d 660, 663 (Mo. Ct. App. S.D. 1999) (“A challenge of pretensive venue based on defective pleadings should be determined when the challenge is adjudicated and upon the state of the pleadings at that time.”)). Nevertheless, Respondent again declined to apply the second test for pretensive joinder, stating that to do so “would in effect be a declaration by the Court that BNSF is entitled to summary judgment, a ruling BNSF has not sought.” *Order, St. Louis City Cir. Ct. (Dec. 17, 2004), p. A18*. Thus, Respondent erred as a matter of law in refusing to apply the second test for pretensive joinder.

Application of the second test of pretensive joinder mandates transfer of venue of this case out of the City of St. Louis to Saline County. The unopposed affidavits that Relators filed in support of their Motions to Transfer Venue demonstrate that Plaintiff was not an employee of BNSF at the time of his accident and had no reasonable basis for believing when he filed his lawsuit that he was an employee of BNSF at the time of his accident. *See Affidavit of Eric Ege*, ¶¶ 6-9, pp. A2-A3; *Affidavit of Thomas Martin*, ¶¶ 6-14, pp. A4-A9.

Only employees of a railroad may bring suit against the railroad under the FELA, *Bailey v. Missouri-Kansas-Texas R.R.*, 732 S.W.2d 248, 250 (Mo. Ct. App. E.D. 1987), but Plaintiff was not an employee of BNSF at the time of his accident and, therefore, has no claim against BNSF under the FELA. The uncontroverted evidence submitted by

Relators in support of their Motions to Transfer Venue demonstrates that Plaintiff was not an employee of the BNSF at the time of his accident and Plaintiff had no objectively reasonable basis for believing when he filed his lawsuit that he was an employee of BNSF at the time of his accident. *See Affidavit of Eric Ege*, ¶¶ 6-9, pp. A2-A3; *Affidavit of Thomas Martin*, ¶¶ 6-14, pp. A4-A9.⁴ Indeed, Plaintiff never asserted in his Response and Objection to Defendants' Motions to Transfer Venue that he was an employee of BNSF or that he believed at the time he filed his lawsuit that he was an employee of BNSF at the time of his accident. *See Plaintiff's Response and Objection to Defendants' Motion to Transfer Venue*, Ex. 5, pp. 89-90.

Thus, if Respondent had applied the second test for pretensive joinder articulated by this Court, he could have reached no other conclusion than that venue is improper in the City of St. Louis. *See Doe Run Resources Corp.*, 128 S.W.3d at 504; *Shelton*, 879 S.W.2d at 527; Mo. Rev. Stat. § 508.040. Respondent erred in denying Relators' Motions to Transfer Venue and failed to perform a ministerial act required by law, for which this Court should make its alternative writ of mandamus peremptory, compelling Respondent to transfer venue of the case. *Shelton*, 879 S.W.2d at 530 (citing Mo. Rev. Stat. § 476.410).

⁴ The affidavits submitted by Relators in support of their Motions to Transfer Venue describe in evidentiary detail the circumstances of Plaintiff's railroad employment that establish that Plaintiff is not an employee of BNSF.

III. Relators Are Entitled To An Order Directing Respondent To Transfer Venue Of This Action Out Of The City Of St. Louis To Saline County, Because Under The “Law Of The Case” Respondent Erroneously Refused To Transfer Venue, In That The Missouri Court Of Appeals Had Already Once Entered An Extraordinary Writ In This Case, Before It Was Voluntarily Dismissed And Re-Filed, Ordering Respondent To Transfer Venue From The City Of St. Louis To Saline County.

The Missouri Court of Appeals has already entered an extraordinary writ in this case—before it was dismissed and re-filed—ordering venue of the case transferred from the City of St. Louis to Saline County. *See Order, Mo. Ct. App. E.D., No. ED 82696 (May 6, 2003), Ex. 2E, pp. 31-32.* The fact that Plaintiff dismissed his lawsuit and re-filed it against the same defendants on the same claims, with the only change being the addition of another theory of liability against one of the defendants, does not make the re-filed action a different case than the originally-filed action for purposes of application of the doctrines of the “law of the case” and res judicata. *See Bellon Wrecking & Salvage Co. v. David Orf, Inc.*, 983 S.W.2d 541, 546 (Mo. Ct. App. E.D. 1998).

The law of the case doctrine states that “prior decisions of the appellate court become the law of the case in any subsequent proceedings, and the trial court is without power to modify, alter, amend, or otherwise depart from those decisions.” *State v. Pettaway*, 81 S.W.3d 126, 130 (Mo. Ct. App. W.D. 2002); *see also Mallet v. State*, 769 S.W.2d 77, 84 (Mo. 1989) (Blackmar, J., concurring) (noting that venue question

resolved on initial appeal constituted the “law of the case” binding on successive trial).

“The doctrine of the law of the case governs successive appeals involving the same issues and the same facts.” *Oldaker v. Peters*, 869 S.W.2d 94, 97 (Mo. Ct. App. W.D. 1993).

Under this doctrine, an adjudication by a court of appeals “is conclusive not only as to all questions raised directly and passed upon, but also as to matters which arose prior to the first appeal and which might have been raised thereon but were not.” *Czapla v. Czapla*, 94 S.W.3d 426, 428-29 (Mo. Ct. App. E.D. 2003). Even if a case is dismissed and re-filed following an appellate decision, the issues decided by the appellate court are the “law of the case” and binding on subsequent re-filed actions. *See Bellon Wrecking & Salvage Co.*, 983 S.W.2d at 546.

When it issued its writ of prohibition in the originally-filed lawsuit ordering venue of the case transferred out of the City of St. Louis, the Court of Appeals settled the question of venue in this action. The Order of prohibition issued by the Court of Appeals on May 6, 2003, directing Respondent to transfer venue of this case out of the City of St. Louis to Saline County, *Order, Mo. Ct. App. E.D., No. ED 82696 (May 6, 2003)*, *Ex. 2E, pp. 31-32*, became the law of the case.⁵ *See Bellon Wrecking & Salvage*, 983

⁵ Although the Court of Appeal’s Order making the Writ of Prohibition permanent was based on Respondent’s failure to respond to the preliminary Order, the Order carries the same force of law as if it had been entered on the merits after briefing and argument. *See Drainage Dist. No. 1 Reformed, of Stoddard County v. Matthews*, 234 S.W.2d 567

S.W.2d at 546. Plaintiff should not be permitted to circumvent the effect of the appellate court's previous order by taking a voluntary dismissal and then re-filing the case eight days later in the very county out of which the Court of Appeals had already ordered the case transferred. Neither was Respondent free to disregard that Order simply because Plaintiff took a voluntary dismissal and then re-filed the same case against the same defendants in an effort to avoid the effect of the appellate court's Order. *See Pettaway*, 81 S.W.3d at 130; *see also Mallet*, 769 S.W.2d at 84 (Blackmar, J., concurring); *Oldaker*, 869 S.W.2d at 97; *Czapla*, 94 S.W.3d at 428-29.

IV. Relators Are Entitled To An Order Directing Respondent To Transfer Venue Of This Action Out Of The City Of St. Louis To Saline County, Because Under The Doctrine Of Res Judicata Respondent Erroneously Refused To Transfer Venue, In That The Missouri Court Of Appeals Had Already Once Entered An Extraordinary Writ In This Case, Before It Was Voluntarily Dismissed And Re-Filed, Ordering Respondent To Transfer Venue From The City Of St. Louis To Saline County.

The doctrine of res judicata likewise required Respondent to grant Relators' Motions to Transfer Venue based on the Order of prohibition previously entered by the Court of Appeals in this case before the case was dismissed and re-filed. The general principle of res judicata is that:

(Mo. 1950) (recognizing res judicata effect of default judgment).

[A] right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

SE-MA-NO Elec. Coop. v. City of Mansfield, 321 S.W.2d 723, 729 (Mo. Ct. App. 1958) (quoting *S. Pac. R.R. v. United States*, 168 U.S. 1, 48-49 (1897)). The doctrine of res judicata states that a “former judgment is conclusive in a second suit between the same parties where the same legal right as that involved in the former suit comes again in issue.” *State ex rel. Buchanan County v. Patton*, 197 S.W. 353, 354 (Mo. 1917). The principle of res judicata applies to appellate courts’ granting of special writs, such as writs of mandamus and prohibition. *See Penner v. Whitesell*, 538 S.W.2d 772, 773-74 (Mo. Ct. App. 1976) (noting that the granting of a writ of mandamus “falls within the principle of res judicata”).

One commentator has described application of the doctrine of res judicata under circumstances that do not result in a judgment on the merits as “direct estoppel.”

Direct estoppel is used most often when the first action results in a judgment that is not on the merits. When that occurs, the determinations made on those issues actually litigated and necessarily determined in the course of handing down the judgment will be binding in all subsequent

suits on the same cause of action. For example, if in the course of a lawsuit the parties litigate the issue of the court's jurisdiction, and the court makes a determination on it, the doctrine of direct estoppel will preclude reconsideration of that issue in a subsequent suit brought in the same court between the same parties on the same cause of action.

Jack H. Friedenthal et al., *Civil Procedure* § 14.1 (3d ed., 1999).

Because the Court of Appeals made permanent its Writ of Prohibition ordering venue of the case transferred out of the City of St. Louis to Saline County, *Order, Mo. Ct. App. E.D., No. ED 82696 (May 6, 2003), Ex. 2E, pp. 31-32*, the doctrine of res judicata applies to fix venue of this action in Saline County. Although Plaintiff added a count to his re-filed lawsuit alleging an additional cause of action against BNSF, the parties to the lawsuit and the claim being sued upon were identical. The proper method for Plaintiff to attack the Court of Appeals' Order was to appeal it, not to voluntarily dismiss his case and re-file it. Therefore, Respondent was bound to follow the Order of the Court of Appeals directing the transfer of this case out of the City of St. Louis to Saline County.

CONCLUSION

Respondent acted contrary to law in violation of his statutory, ministerial duty to transfer cases filed in an improper venue. Respondent erred in failing to apply the second test for pretensive joinder. If Respondent had applied the second test for pretensive joinder and considered the uncontroverted evidence Relators submitted in support of their Motions to Transfer Venue, Respondent would have had no choice but to order the case

transferred to Saline County. Moreover, Respondent was bound by the previous decision of the Court of Appeals, fixing venue of this case in Saline County.

For the above-stated reasons, Relators The Kansas City Southern Railway Company and Gateway Western Railway Company respectfully request this Court make its Alternative Order of Mandamus peremptory, directing Respondent, the Honorable Michael P. David, to transfer venue of this cause from the City of St. Louis to Saline County, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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* These materials were filed as exhibits with Relator's Petition for a Writ of Mandamus or, in the alternative, Petition for a Writ of Prohibition on March 24, 2005. All documents are from Cause No. 032-01602 in St. Louis City, unless otherwise indicated.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief contains the information required by Mo. R. Civ. P. 55.03, complies with the limitations in Missouri Supreme Court Rule 84.06(b), and it contains 5,996 words, excluding the parts of the brief exempted; has been prepared in proportionately spaced typeface using Microsoft Word 2003 in 13 pt. Times New Roman font; and includes a virus-free 3.5" floppy disk in Microsoft Word format.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing brief, were sent via Federal Express, overnight, this 5th day of July, 2005, to be received on July 6, 2005, to each of the following:

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